Filed 7/9/15 Espinoza v. Baca CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ALFRED ESPINOZA et al., Plaintiffs and Respondents, v. DAVID BACA, Defendant and Appellant.	A141082 (Contra Costa County Super. Ct. No. MSC0801917)

Defendant and appellant David Baca ("Baca") appeals from the trial court's judgment following its order striking Baca's answer to plaintiffs' complaint as a discovery sanction. Because the court did not abuse its discretion, we affirm.

BACKGROUND

The present lawsuit was filed in October 2008. According to the allegations in the third and operative complaint (Complaint), filed in December 2009, defendant Allstate Contract Floors, Inc. ("Allstate"), was a tile contractor company owned by Baca.[1] The individual plaintiffs worked as tile setters or tile helpers,[2] and plaintiff Northern California Tile Industry Labor Management Trust Fund is an assignee of the claims of

[1] The Complaint was brought against Allstate, Baca, and 30 "Doe" defendants. Only Baca is a party to the present appeal. Respondents assert in their brief on appeal that Allstate ceased doing business in 2010.

[2] The individual plaintiffs are Alfred Espinoza, Brett Stone, Gilbert Dominguez, Luis Pelayo, and Nick McCloskey.

two other former Allstate employees (collectively, "plaintiffs").[3] The Complaint alleges claims for unpaid wages and overtime, among other claims. The Complaint also alleges a retaliatory termination claim on behalf of plaintiff Luis Pelayo. The Complaint alleges Baca is responsible for the claims against Allstate on an alter ego theory of liability.

Baca filed an answer to the Complaint; Allstate failed to respond, and the trial court entered Allstate's default in April 2010. In May 2011, Baca filed a substitution of attorney, indicating his election to represent himself. Following the presentation of evidence at a December 2011 hearing, the trial court awarded plaintiffs over $760,000 in damages against Allstate, plus interest and attorneys' fees. At the December 2011 hearing, Baca told the court he intended to file a personal bankruptcy petition, and he continued to indicate so at subsequent case management conferences.

No petition had been filed by August 2012, and at that time plaintiffs propounded discovery on Baca consisting of nine special interrogatories and eight requests for production of documents. The interrogatories asked Baca to identify interests in real property, bank accounts, and securities accounts held by him individually or as a trustee; the interrogatories also asked for information about Baca's employment history, his personal identifying information, and his accountants. The requests for production requested, in part, various documents relating to the same financial interests referenced in the interrogatories.

Baca did not respond to the discovery requests,[4] and, on September 20, 2012, plaintiffs told Baca in a letter that they would move to compel if he did not respond. Plaintiffs moved to compel on October 3; Baca did not file an opposition and the trial court granted the motion on November 8. The court directed Baca to respond to the discovery requests within five days, but he failed to do so. Plaintiffs wrote to Baca on

[3] The suit was brought on behalf of a class of Allstate employees, but the trial court's judgment did not award class-wide relief.

[4] On August 29, 2012, Baca wrote a letter to plaintiffs' counsel stating he had made a "diligent search and reasonable inquiry" and did not have any of the requested documents in his "possession, custody, or control." Baca does not contend the letter was a legally sufficient response to plaintiffs' discovery requests.

November 15 and 28, requesting responses to their discovery requests and advising Baca they would move to strike his answer if he failed to comply with the trial court's order.[5]

On March 1, 2013, plaintiffs filed a motion requesting that the trial court strike Baca's answer and enter his default on the Complaint. Baca opposed the motion. On April 4, Baca's current counsel entered his appearance in the case. The motion was heard on April 22, and on April 29 the trial court entered an order striking Baca's answer. The court's order states that, just before the April 22 hearing, Baca's counsel delivered to the trial court a document entitled "Notice of Compliance with Request for Documents," to which 40 pages of materials were attached. Appellant does not cite to anywhere in the record where the document can be found, or argue that submission of the document constituted compliance with the discovery requests.

In the meantime, on April 26, 2013, Baca filed a petition in bankruptcy court. The trial court was apparently unaware of the petition at the time it entered its order striking Baca's answer, because the court's order does not reference the bankruptcy petition. On September 3, the bankruptcy court dismissed Baca's petition; the order stated, "the automatic stay of claims against debtors under 11 U.S.C. §362(a) is annulled, with respect to [plaintiffs'] claims only, retroactive to April 26, 2013."[6]

On September 18, 2013, the trial court entered Baca's default. On that same date, Baca moved to vacate entry of the default. On October 29, the court denied the motion.

Following a hearing, the trial court entered its First Amended Judgment (Judgment) jointly and severally against both Allstate and Baca on December 11, 2013. The Judgment awarded plaintiffs approximately $930,000, including interest, attorneys' fees, and costs. This appeal followed.

---

[5] Baca asserts that, on December 6, 2012, he wrote a letter to the trial court and plaintiffs' counsel "to explain himself with respect to these discovery requests." He does not contend the letter constituted compliance with the court's order.

[6] During the pendency of the bankruptcy proceeding, plaintiffs moved for an order severing claims and entering judgment against Allstate. Judgment was entered against Allstate on July 1, 2013.

DISCUSSION

Baca appears to contend the trial court abused its discretion in granting the motion to compel, entering Baca's default, and denying Baca's motion to vacate the default. (*2,022 Ranch v. Superior Court* (2003) 113 Cal.App.4th 1377, 1387, disapproved on another ground in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 739 [motion to compel]; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496 (*R.S. Creative*) [discovery sanctions]; *Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1318 [motion to vacate default].) His claims are without merit.

At the outset, Baca forfeited any objections to plaintiffs' August 2012 discovery requests by failing to respond and by failing to oppose the motion to compel. (Code Civ. Proc. §§ 2030.290, subd. (a) & 2031.300, subd. (a);[7] *Scottsdale Ins. Co. v. Superior Court* (1997) 59 Cal.App.4th 263, 273 [failure to respond to discovery]; *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1602 [failure to oppose motion].) Accordingly, any claims the discovery requests were inappropriate or the trial court erred in granting the motion to compel are not cognizable on appeal.[8]

Baca next contends the trial court erred in striking his answer as a sanction for the discovery violations. The applicable law was summarized by the court in *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495: "Failing to respond to an authorized method of discovery is a misuse of the discovery process. (§ 2023.010, subd. (d).) So is disobeying a court order to provide discovery. (*Id.*, subd. (g).) If a party fails to obey an order compelling answers to special interrogatories and/or an order compelling a response to a

---

[7] Hereafter, all undesignated statutory references are to the Code of Civil Procedure.

[8] A showing that the discovery requests were unrelated to plaintiffs' alter ego theory of liability might be relevant to the question of whether terminating sanctions were appropriate. However, Baca has failed to make any such showing. On its face, the requested information about Baca's finances was logically related to the issue of whether Allstate was Baca's alter ego. As Baca acknowledges, " ' "[c]ommingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses" ' " is one of the relevant factors in the determination. (*Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 811.)

demand for production of documents, the court may impose a terminating sanction by striking out the pleading of that party and/or rendering a judgment by default against that party. (§§ 2023.030, subd. (d)(1) & (3), 2030.290, subd. (c), 2031.300, subd. (c).)" (*Gilbert*, at p. 1516.) *Gilbert* continued, " 'The trial court should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should " 'attempt[ ] to tailor the sanction to the harm caused by the withheld discovery.' " [Citation.] The trial court cannot impose sanctions for misuse of the discovery process as a punishment.' [Citation.] ' "Discovery sanctions 'should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery.' " [Citation.] If a lesser sanction fails to curb abuse, a greater sanction is warranted: continuing misuses of the discovery process warrant incrementally harsher sanctions until the sanction is reached that will cure the abuse. "A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with discovery rules, the trial court is justified in imposing the ultimate sanction." ' " (*Ibid*.)

Baca argues broadly that the trial court abused its discretion because it did not employ other sanctions, such as monetary sanctions or issue preclusion, before striking Baca's answer. (See *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992 ["The discovery statutes evince an incremental approach to discovery sanctions, starting with monetary sanctions and ending with the ultimate sanction of termination. . . . If a lesser sanction fails to curb misuse, a greater sanction is warranted: continuing misuses of the discovery process warrant incrementally harsher sanctions . . . ."]; *R.S. Creative*, *supra*, 75 Cal.App.4th at p. 496 ["[T]erminating sanctions are to be used sparingly, only when the trial court concludes that lesser sanctions would not bring about the compliance of the offending party."].)

In imposing terminating sanctions on April 29, 2013, the trial court explained, "The Court concludes that the failure of David Baca to comply with the order of this Court, even after a motion was filed, interferes with the ability of the opposing side and

the Court to proceed with this litigation, which must go to trial due to [the] five year trial requirements. This conduct is oppressive to such a degree as to leave only terminating sanctions as an appropriate remedy for the Court to impose. The Court will, therefore, exercise its discretion, based upon the totality of the circumstances, to grant the motion." In their brief on appeal, plaintiffs defend the trial court's reasoning. They argue that evidentiary or issue sanctions would have been effectively equivalent to striking Baca's answer, because the basis of Baca's liability was the alter ego theory that was the subject of the discovery requests. Baca does not dispute this reasoning in his reply brief.

As to monetary sanctions, plaintiffs argue such sanctions would have been ineffective because trial was only a month away, in May 2013, and postponement of trial was not feasible because section 583.310 required plaintiffs to bring the case to trial by October 2013. (§ 583.310 ["An action shall be brought to trial within five years after the action is commenced against the defendant."].) Plaintiffs assert it could have taken months to obtain records from financial institutions identified by Baca and "years of bank records of both Allstate and Baca would have needed to be analyzed in order to piece together the cash flow." The trial court agreed the delay interfered with plaintiffs' ability to proceed with the litigation in a timely fashion. Accordingly, even if monetary sanctions had been successful in compelling Baca to comply with the discovery requests shortly after the April hearing on the motion to strike his answer, plaintiffs were left without sufficient time to prepare for trial on the alter ego theory. Baca's only response to plaintiffs' argument in his reply brief is that plaintiffs were partially at fault for the time constraints because they failed to request discovery on the alter ego theory until August 2012. Plaintiffs suggest that part of the delay was due to Baca's representations in late 2011 and early 2012 that he was going to be filing a bankruptcy petition, which would have stayed the litigation. In denying Baca's motion to vacate, the trial court expressed its agreement with plaintiffs' view. In any event, Baca does not explain why any delay on the part of plaintiffs precluded the trial court from issuing terminating

sanctions, where plaintiffs were in fact prejudiced by his refusal to respond to their discovery requests.[9]

In regards to the October 2013 denial of Baca's motion to vacate the entry of his default, Baca does not contend he made any showing that his default was due to mistake, or that any changed circumstances or new evidence justified a different ruling. His only contention is that the trial court demonstrated a "prejudicial dislike of Baca" because the court stated during the hearing, "[t]his guy is no innocent lamb. This guy's got 13 cases in our county." Baca also points to the court's statement that "[Baca] knew what he was doing when he didn't answer those interrogatories." Those isolated comments fail to demonstrate bias against Baca; Baca cites no authority to the contrary. Furthermore, as the trial court had sufficient basis to impose terminating sanctions in April 2013, and Baca has not shown there was any new evidence or a change in circumstances, the court's refusal to reverse its previous ruling did not constitute an abuse of discretion.

Finally, Baca emphasizes that he was a self-represented litigant at the time of the discovery requests and motion to compel. He asserts it was the trial court's "responsibility to ensure that the merits of a controversy are resolved fairly and justly." He asserts his failure to respond to the discovery requests was "mere inadvertence" and the consequent striking of his answer constituted resolution of the case on a "technicality." The record does not support his assertions. Appellant had adequate notice and opportunity to respond to the discovery requests, motion to compel, and order compelling discovery responses; Baca has not shown his failures to respond resulted from mistakes. Neither has Baca presented any authority that his status as a self-represented litigant excused him from his obligation to respond to discovery requests or prohibited the trial court from imposing terminating sanctions. (*Gamet v. Blanchard* (2001) 91

[9] Baca does not argue that any exception to section 583.310 would have permitted the plaintiffs to bring the case to trial after October 2013. (See *De Santiago v. D & G Plumbing, Inc.* (2007) 155 Cal.App.4th 365, 371.) We need not and do not address any such contention, which has been forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785.)

Cal.App.4th 1276, 1284 ["in propria persona litigants are not entitled to special exemptions from the California Rules of Court or Code of Civil Procedure"].)

Baca has not demonstrated the trial court abused its discretion in any of the determinations at issue on appeal.[10]

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to plaintiffs.

[10] Baca also contends plaintiffs presented insufficient evidence to support a finding of liability under the alter ego theory. However, the trial court's entry of default bars Baca from disputing the evidence establishing his liability. (*Steven M. Garber & Associates v. Eskandarian* (2007) 150 Cal.App.4th 813, 823–824 ["appellants' efforts to argue the merits of their case are barred substantively by the default judgment, which operates as an admission of the allegations of the complaint, and are also barred procedurally by the entry of a default"]; see *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 281; see also *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1303.)

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.

.